HONG LEONG BANK BHD

v.

VIMTEX SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI J
[CIVIL SUIT NO: D1-22-885-98]
29 JUNE 2001

CIVIL PROCEDURE: *Parties - Company under receivership - Application to enter summary judgment against - Whether leave of court necessary - Rules of the High Court 1980, O. 14, O. 30*

COMPANY LAW: *Receivership - Duties and accountability of receiver*

This was an appeal by the plaintiff bank against the decision of the learned senior assistant registrar who had on 17 July 1998 dismissed the plaintiff's application to enter summary judgment against the first defendant, a company which is under receivership, without going into the merits of the case and after allowing a preliminary objection raised by the solicitors for the receivers and managers for the first defendant. The preliminary objection was that since the receivers and managers had been appointed for the first defendant by the High Court in another suit, the plaintiff needed to apply for leave from that court before commencing this action and since the plaintiff did not obtain such leave prior to the commencement of this action the application to enter summary judgment ought to be dismissed.

Held:

[1] The appointment of a receiver and manager by the court takes effect from the moment the order appointing the receiver and manager is pronounced. From the instant of his appointment, the receiver and manager is an officer of the court and is accountable to this court as such. The receiver and manager immediately performs his duties under the protection of the court and derives no title of estate from the order which appoints him. The receiver and manager is simply an officer of the court responsible for collecting and dealing with the property covered by the appointment on behalf of the parties to the proceedings. The order appointing the receiver and manager does not of itself effect a change of possession and any property which the receiver and manager holds subject to the appointment is technically in the possession of the court. (p 202 b-f)

[2] The court-appointed receiver and manager is an officer of the court. It is trite law that without leave of the court, nobody can bring an action or enforce his rights against a receiver or the property in his possession. Any interference with him or with property under his control constitutes a contempt of court. The receiver and manager is therefore shielded from interference by any person who does not obtain the leave of the court. (p 206 c)

[Appeal dismissed.]

Case(s) referred to:

Sime Bank Bhd v. Lal Bhohraj Khanchandani & Ors [1999] 6 CLJ 168 ***(refd)***
Tai Kwong Goldsmiths & Jewellers v. Yap Kooi Hee & Ors [1995] 1 MLJ 1 ***(foll)***
Zainal Abidin Putih & Anor v. Che Wan Development Sdn Bhd [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381 ***(refd)***

Legislation referred to:

National Land Code, s. 256
Rules of the High Court 1980, O. 14, O. 30 r. 1

Other source(s) referred to:

James O'Donovan, *Company Receivers and Managers*, 2nd edn, pp 7624-7625, 7631, 7632
Kerr, *Law and Practice as to Receivers and Administrators*, 17th edn, p 147

For the plaintiff - Simon Hue Fook Chuan; M/s Ho, Loke & Koh
For the 1st respondent - G Rajasingam; M/s Shearn Delamore & Co

Reported by Mariette Peters-Goh

JUDGMENT

Mohd Ghazali J:

The plaintiff, a local bank has appealed to the judge in chambers against the decision of the learned senior assistant registrar ("SAR") who had on 17 July 1998, dismissed the plaintiff's application to enter summary judgment against the 1st defendant (encl. 4), a company which is under receivership, without going into the merits of the case after allowing a preliminary objection raised by solicitors for the receivers and managers for the 1st defendant, namely, that since receivers and managers have been appointed for the 1st defendant by the High Court in another suit, the plaintiff needs to apply for leave from that court before commencing this action and since the plaintiff did not obtain such leave prior to the commencement of this action, the said application to enter summary judgment ought to be dismissed.

It is the plaintiff's claim that it had at the request of the 1st defendant granted the latter banking facilities pursuant to an agreement dated 29 June 1995. The 2nd and 3rd defendants are the guarantors. The 1st defendant defaulted as a

result of which on 3 April 1998 the plaintiff filed this suit claiming for the sum of RM1,578,558.85 allegedly due and owing by the defendants together with interest and costs. The 1st defendant entered appearance on 4 May 1998. On 18 May 1998 the plaintiff filed an application for summary judgment to be entered against the 1st defendant pursuant to O. 14 of the Rules of the High Court 1980.

It is not disputed that by virtue of a court order dated 19 December 1997 ie, before the instant action was filed, *vide* Kuala Lumpur High Court Civil Suit No. D2-22-1303-97 ("the D2 suit") the High Court had, *inter alia*, appointed one Kenneth Teh Ah Kiam and one Chew Hoy Ping from M/s Price Waterhouse Coopers as receivers and managers for the 1st defendant.

In his reply to the preliminary objection raised, counsel for the plaintiff contended that leave is not necessary for the present action but the learned SAR allowed the preliminary objection raised and dismissed the plaintiff's application for summary judgment without going into the merits of the case and hence, this appeal.

The receivers and managers took the objection that the plaintiff had failed to obtain leave of the High Court in the D2 suit. In the D2 suit the High Court made an *ex parte* order, upon the application of Sime Bank Bhd which is the plaintiff, appointing the said Kenneth Teh Ah Kiam and Chew Hoy Ping as the receivers and managers of the business of Lal Bhohraj Khanchandani (the 1st defendant) and Sarinder Kaur d/o Sohan Singh (the 2nd defendant) trading as Vimtex Textiles and Vimtex Sdn Bhd (the 3rd defendant). Paragraph 3 of the said *ex parte* order, *inter alia*, states that the court appoints the said Kenneth Tan Ah Kiam and Chew Hoy Ping, without giving security, as receivers and managers of the business of:

(a) the defendants or any one of them;

(b) Vimla Textiles: and

(c) Vimtex Sdn Bhd,

with certain powers including the power to institute and/or defend any action, claim, suit or other proceedings in the name of or on behalf of the aforesaid persons or any of them.

I would deal with the submission forwarded by the counsel for the 1st defendant as the appeal originated from the preliminary objection raised by that party. In his submission counsel for the 1st defendant submitted the sole issue involved in this appeal may be framed in the following manner, *viz*., whether the plaintiff is required by law to obtain leave of the court in the

D2 suit which appointed the receivers and managers prior to commencing any action against the 1st defendant which is under court appointed receivership.

On the law counsel submitted pursuant to O. 30 r. 1 of the Rules of the High Court ("the Rules") the court may appoint a receiver upon an application by summons or motion. The very rudimentary principles relating to the appointment of a receiver and manager by the court may be stated as follows:

(1) The appointment of a receiver and manager by the court takes effect from the moment the order appointing the receiver and manager is pronounced.

(2) From the instant of his appointment, the receiver and manager is an officer of the court and is accountable to the court as such.

(3) The receiver and manager immediately performs his duties under the protection of the court.

(4) The receiver and manager derives no title or estate from the order which appoints him.

(5) The receiver and manager is simply an officer of the court responsible for collecting and dealing with the property covered by the appointment on behalf of the parties to the proceedings.

(6) The order appointing a receiver or manager does not, of itself, effect a change of possession.

(7) Any property which the receiver and manager holds subject to the appointment is technically in the possession of the court.

After the receiver and manager's appointment is complete and he takes possession, any person who, without the leave of the court, interferes with the receiver and manager, his possession or the property covered by the order may be liable for contempt. Even a debenture holder or another receiver cannot disturb the receiver and manager's possession without the authority of the court. Counsel then referred to Kerr on the *Law and Practice as to Receivers and Administrators* (17th edn) at p. 147 which reads:

> **Application for leave to proceed.** Persons whose rights are interfered with by having a receiver put in their way may, on making a proper application to the court, obtain all that they can justly require. The court will always take care to give to a party, who applies in a regular manner, protection of his rights, and will even assist him in asserting his rights and having the benefit of them, though the court does not profess to cure every inconvenience arising from its action in appointing a receiver. An instance is the method adopted to enable creditors of a partnership business to obtain payment from the receiver without legal execution, which is discussed on another page.

> The proper course for a person to adopt who claims a right paramount to that of the receiver, or rather that of the party who obtained the receiver, and who is prejudiced by having the receiver put in his way, is to apply to the court for leave to proceed, notwithstanding the possession of the receiver, or to come in and be examined *pro interesse suo*. The former course is, usually, preferable ... .

Counsel then referred to the *Company Receivers and Managers* by James O'Donovan (2nd edn) at pp. 7624-7625 which reads:

> **Interference with a receiver and manager appointed by the court.**
>
> *The general proposition*
>
> After the receiver and manager's appointment is complete and he takes possession, any person who, without the leave of the court, interferes with the appointee, his possession or the property covered by the appointment may be liable for contempt... .
>
> The receiver and manager is shielded from interference by any person who does not obtain leave of the court. Even the debenture holder or another receiver should not disturb the appointee's possession without the authority of the court. Equally, a person with a paramount title or a person for whose protection the appointment was made may intervene only with leave.
>
> If the court did not protect its officer in this way it would be abandoning its own jurisdiction and ignoring an erosion of its authority. Any person claiming a paramount title or purporting to have a valid claim to the assets covered by the appointment could prevent the execution of the court's order and hinder the administration of justice.

On the procedure to be followed by a person with a claim against the receiver, counsel once again referred to the *Company Receivers and Managers* by James O'Donovan at p. 7631 which reads:

> Contempt proceedings can be avoided if any person with a legitimate claim against the receiver or the property in the possession of the court applies for leave to assert or enforce his rights or for leave to be examined *pro interesse suo*. The application should be made in the action in which the receiver was appointed and to the same court. It may be made by petition but the usual form is a motion or summons on notice in the action. Where the receiver is in possession of the property to be affected by the order sought he must be made a party to the proceedings.

Counsel then referred to the case of *Sime Bank Bhd v. Lal Bhohraj Khanchandani & 2 Ors* [1999] 6 CLJ 168. In that case the court was faced with a situation where the plaintiff bank, as a chargee of a land which was put up as security, filed a charge action for an order for sale of the land under s. 256 of the National Land Code. The plaintiff bank subsequently adjourned

the charge action to enable it to seek leave of the court in the receivership action which was before another court to proceed with its charge action as receivers and managers had been appointed in the receivership action over the assets of the company.

Counsel also referred to the case of *Zainal Abidin Putih & Anor v. Che Wan Development Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381. The background to the above case show that in a separate suit between Che Wan Development Sdn Bhd (the respondent") and the Co-operative Central Bank ("CCB"), the court made an order that CCB do return to the respondent 39 documents of titles of properties. It was also ordered that CCB do pay the respondent costs of that application. About a year later another action was commenced by the respondent against Zainal Abidin Putih and Ahmad Kamal bin Abdullah Al-Yafii ("the appellants") who were appointed receivers and managers for CCB wherein the respondent sought, *inter alia*, for an order that the appellants are liable to pay the costs taxed by the SAR pursuant to the order of the judge in the earlier suit. Gunn Chit Tuan SCJ (as he then was) said as the appellants were appointed receivers by the court and as officers of the court, leave of the court should have been obtained to proceed against them in the second action.

Counsel submitted it is the stand of the receivers and managers that once they have taken possession of the property/assets covered by the court order of 19 December 1997, the appellant must obtain leave of the court in the receivership action before commencing any action against the 1st defendant. The plaintiff seeks to recover monies of the 1st defendant which are in the hands of the receivers and managers and which form part of the property covered by the receivers and managers' appointment and that being so, leave of the court in the receiver action must be obtained prior to commencing any proceedings against the 1st defendant which is under a court-appointed receivership.

In his written submission, counsel for the plaintiff submitted the only issue before this court is whether leave of the court is necessary before a creditor can sue a debtor company which is under a court-appointed receivership. It is his stand leave is normally only required when the action is against the receiver personally or when execution proceedings are taken against the assets in the custody of the receiver or where rights are enforced which involved some interference with the receiver or with property under his control, like ejectment proceedings or distress actions. There is no direct authority which supports the preliminary objection of the 1st defendant and hence, on that ground alone, the preliminary objection ought to have been dismissed by the SAR. He pointed out it is crucial to note that:

(a) the plaintiff's present action is not filed against the receiver personally but against the 1st defendant whose legal persona remains intact;

(b) the plaintiff is merely suing the 1st defendant for a debt and seeking to obtain judgment for a debt and by seeking judgment, the plaintiff is merely trying to ascertain or establish a previously existing liability of the 1st defendant to the plaintiff;

(c) the present action cannot in any way be construed as an interference with the receiver or with property under his control; it is not an application by the plaintiff for payment by the receiver of what is due to the plaintiff;

(d) the present action is not an execution proceeding which would require leave but has merely reached the stage for summary judgment for a debt; the plaintiff concedes that if a summary judgment is entered against the 1st defendant and if the plaintiff, as judgment creditor, is desirous of executing the judgment, then leave of the court must be obtained before and executing the judgment but not otherwise.

Counsel contended there is no provision in the companies Act 1965 which prohibits or restrains a creditor from suing a debtor company which is under a court appointed receivership. He then referred to the *Company Receivers and Managers* by O'Donovan at p. 7623 which reads:

> The receiver and manager derives no title or estate from the order which appoints him. He is simply an officer of the court responsible for collecting and dealing with the property covered by the appointments on behalf of the parties to the proceedings and the rightful owners.

Counsel stressed that by the very nature of the civil suit commenced herein, the plaintiff is merely suing for a debt and by the application is merely applying for an order that summary judgment be entered against the 1st defendant. He pointed out the plaintiff did not and is not applying for an order requiring the 1st defendant or receivers and managers to make payments to the plaintiff but merely to have the liability of the 1st defendant determined and ascertained by the court in favour of the plaintiff. He however concedes that it would of course be necessary for the plaintiff to obtain leave of the court in the D2 suit if the plaintiff were to apply for an order requiring the 1st defendant or the receivers and managers to make payments to the plaintiff or to recover monies by enforcing the judgment, if obtained, by execution proceedings as that would constitute an interference with the receivers and managers.

If I understand counsel for the plaintiff correctly, his contention is since the present action is not an action against the receivers and managers but against the 1st defendant, leave of the court in the D2 suit is not required.

His argument is that the plaintiff is merely applying for summary judgment to be entered against the 1st defendant and has never applied or prayed for payment of the monies in the hands of the receivers and managers and the property in the hands of the receivers and managers are and were never intended to be affected by the result of the litigation in the instant case. The object of the suit is not also to interfere with the possession of the receivers and managers.

I cannot agree with the submission of counsel for the plaintiff. The court-appointed receiver and manager is an officer of the court. It is trite law that without leave of the court, nobody can bring an action or enforce his rights against a receiver or the property in his possession. In *Tai Kwong Goldsmiths & Jewellers (under receivership) v. Yap Kooi Hee & Ors* [1995] 1 MLJ 1 VC George J said (at p. 6)

> It is trite that a court-appointed receiver is an officer of the court and accordingly, any interference with him or with property under his control constitutes a contempt of court.

The learned judge continued (at p. 7):

> The authoritative *Company Receivers and Managers* (2nd Ed) by James O'Donovan refers to a whole string of authorities to conclude at p. 7625:
>
> > The receiver and manager is shielded from interference by any person who does not obtain the leave of the court. Even the debenture holder or another receiver should not disturb the appointee's possession without the authority of the court. Equally, a person with a paramount title or a person for whose protection the appointment was made may intervene only with leave.
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> As does the even more authoritative Kerr on *The Law & Practice of Receivers and Administrators* (17th Ed) where at p. 143 is the unqualified statement:
>
> > When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave.
>
> If any action is brought against the receiver without leave, its further prosecution will be restrained - *Searle v. Choat* [1884] 25 Ch D 723.

Counsel for the plaintiff insisted that since the plaintiff by this current action is merely suing for a debt and by the application is merely applying for summary judgment to be entered against the 1st defendant and is not applying for an order requiring the 1st defendant or receivers and managers to make payments to the plaintiff but merely to have the liability of the 1st defendant determined and ascertained, no leave is required. In the light of the authorities

discussed above, I cannot accept that argument. Upon being appointed by the court, receivers and managers will take out of the company's hands of control of their assets and the management of their businesses. The board of directors will normally be excluded from the running of the company and they will not be able to deal with the company's property included in the appointment. Generally the making of the order will entail serious legal consequences for the company.

The affidavits filed by both parties show that the plaintiff was well aware of the receivership prior to the filing of the action. They want to assert their rights by filing the suit. If they are successful in their application for summary judgment, they will obviously pursue execution proceedings. To say that that would be the stage when they would need leave from the court cannot hold water. The suit filed is an action against the 1st defendant which is under a court appointed receivership. I cannot find any authority to support the plaintiff's contention that leave is only required prior to commencing execution proceedings and not before commencing any action.

For the above reasons, I would dismiss this appeal by the plaintiff.